1021.

# SUPREME COURT OF THE UNITED STATES.

No. 87.

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WILLIAM B. BEND, PLAINTIFF,

VERSUS

JESSE HOYT.

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ON CIRTIFICATE OF DIVISION OF OPINION, FROM CIRCUIT COURT UNITED STATES, FOR SOUTHERN DISTRICT OF NEW YORK.

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CIRCUIT COURT OF THE UNITED STATES,
*for the Southern District of New York, in the Second Circuit.*

JESSE HOYT,
*ads.*
WILLIAM B. BEND.

Present, the honorable SMITH THOMPSON,
and SAMUEL R. BETTS.

This cause came before this court, on a certiorari to the superior court of the city of New York, the action being in assumpsit to recover from the defendant the sum of $127 92, received by him as collector of the port of New York, for duties on an importation of silk hose. The duty was levied at the rate of 25 per centum ad valorum, as "Hoisery," under the 2d article of the 2d section of the act of the Congress of the United States, approved on the 14th day of July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports." The plea of non assumpsit was pleaded by the defendant in bar of the action.

Upon the trial it was proved, that on the 29th of March, 1837, an entry was made by the plaintiff, at the office of the collector for the port and district of the city of New York, of eight cases of cotton gloves, marked B, and numbered 38, 39, 40, 41, 42, 43, 44, 45. That case No. 43 was designated on the invoice to be examined, and was passed as correct; whereupon, the duty was levied on each of the eight packages, at 25 per centum ad valorem, as being cotton gloves, which duty was secured by a bond which becomes due on the 27th day of June, 1838.

The entry is in the following words and figures:

*Entry of Merchandize imported by W. B. Bend, in the Ship Roscoe, 6,293; whereof Mc Williams is Master, from Liverpool. New York, March 29th, 1837.*

| Marks. | Numbers. | Packages and Contents. | 25 per cent. | Total. |
|---|---|---|---|---|
| B | 38 | One case cotton gloves | 66 7 0 | |
| | 39 | One do do | 68 14 | |
| | 40 | One do do | 47 19 6 | |
| | 41 | One do do | 70 10 6 | |
| | 42 | One do do | 66 6 0 | |
| | 43 | One cask do | 34 15 0 | |
| | 44 | One do do | 66 7 3 | |
| | 45 | One case do | 116 17 0 | |
| | | | £537 16 9 | |
| | | Discount | 26 17 9 | |
| | | | £510 19 0 | |

| | | |
|---|---|---|
| 2,452 | 25 | 613 00 |
| | $\frac{1}{5}$ | 122 60 |
| | | 490 40 |
| | $4\frac{0}{11}$ | 98 08 |
| | | 588 48 |

W. B. BEND.

*Consignee, Importer, or Agent's Oath.*

M. D. I, Wm. B. Bend, do solemnly and truly swear, that the invoice and bill of lading, now presented by me to the collector of New York, are the true and only invoice and bill of lading by me received, of all the goods, wares, and merchandize, imported in the ship Roscoe, whereof McWilliams is master, from L'pool, for account of any person whomsoever, for whom I am authorized to enter the same, that the said invoice and bill of lading, are in the state in which they were actually received by me, and that I do not know or believe, in the existence of any other invoice or bill of lading of the said goods, wares, and merchandize, that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandize, according to the said invoice and bill of lading; that nothing has been, on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due, on the said goods, wares, and merchandize; and that if at any time hereafter, I discover any error in the said invoice, or in the account now rendered of the said goods, wares, and merchandize, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear, that, to the best of my knowledge and belief, Barker and Adams, of Nottingham, are the owners of the goods, wares, and merchandize, mentioned in the annexed entry, that the invoice now produced by me exhibits the actual cost, or fair market value, at Nottingham, 14th Feb'y, in 1837, in British st'l'ng, of the said goods, wares, and merchandize, all the charges thereon; and no other or different discount, county or drawback, but such as has been actually allowed on the same.

W. B. BEND.

Sworn to, this March 29th, 1837, before me,
JAS. CAMPBELL,
*D'y Collector, Naval Officer.*

It was also proved that in the year 1838, it was discovered by the plaintiff, that case No. 45 did not contain cotton gloves, but actually contained silk hose, and that the plaintiff had paid $127 92 for duties, under the belief that the package contained cotton gloves. On

the 28th day of June, 1838, a protest against the payment of the bond, given to secure the duties, was served on the collector in the following words:

NEW YORK,
*June 26th* 1838.

SIR: You will perceive, by a reference to your books, that my bond (No. 6,294,) given the United States for $294, on account of duties on certain goods consigned to me pr. Roscoe, from Liverpool, on the 27th March, 1837, falls due to-morrow, I claim to have deducted from that bond, the sum of $134 75, which was included by a clear mistake and misapprehension. (as you will perceive by the enclosed affidavit,) and I beg you to take the necessary steps, in order that I may pay the balance, and take up the bond. If you should, however, think proper to refuse this reasonable request, I hereby give you notice that I being obliged by the exigencies of the case to pay said bond, shall pay the same, protesting against the justice of your requiring it, and saving and reserving all my rights to be hereafter asserted before the proper tribunal.

Your ob't hum. ser't,
W. B. BEND.

JESSE HOYT, Esqr.,
*Collector, &c.*

It was also proved, that on the 25th April, 1838, the plaintiff addressed a letter to the Comptroller of the Treasury requesting to be released from the payment of duty, and that the comptroller in reply refused to correct "errors of fact." The letter of the comptroller to the plaintiff, which was read in evidence, is in the following words:

TREASURY DEPARTMENT,
*Comptroller's Office, April 27th,* 1838.

SIR: I have to acknowledge the receipt of your letter of the 25th inst., with the accompanying documents submitted for my examination in regard to your claim for the difference of duty on a case of goods, erroneously entered as cotton instead of silk.

The goods were entered in March 1837, and the error appears to have originated with your clerk in making out the entry.

In reply, I have to observe, that errors growing out of transactions between merchants and the custom-house, are either errors of principle or errors of fact. In the former case, they may be revised, but in the latter, according to the decisions of my predecessors, it has not been considered within the competency of the Department to correct them in instances such as the present; that is, after the merchandize had passed beyond the control of the officers of the customs.

As the question presented, whether the goods were composed of silk or of cotton, is clearly a matter of fact, and should have been settled before the goods were removed. I do not feel authorized to

make your case an exception to the uniform and long established rule of the Department by permitting a revision of the entry.

I am very respectfully,
Your obt. servt.,

*Comptroller.*

Mr. W. B. BEND, *New York.*

An affidavit of the plaintiff was read in evindence by the defendant, to show the habitually loose manner in which the plaintiff transacted his business with the custom-house. The affidavit is in the following words:

STATE OF NEW YORK, *City of New York, ss.*

Be it remembered, that on this twenty-fifth day of April, in the year one thousand eight hundred and thirty-eight, personally appeared before the subscriber, a public notary, residing in the city of New York, duly commissioned and sworn, William B. Bend, who being duly sworn upon the Holy Evangely of Almighty God, deposes and says, that on the 27th day of March, 1837, he imported in the ship Roscoe, from L'pool, eight cases and casks of hosiery and gloves, marked B. 38 and 45, owned by Barker and Adams, manufacturers of Nottingham. Eng., and consigned by them to him, the said Wm. B. Bend, for sale. That his clerk not being able to ascertain from the wording of the invoice, which packages contain gloves, and which hoisery, and knowing that cotton gloves and cotton hoiserey paid the same duty, he entered them all upon arrival at the custom-house, in the port of New York, as cotton gloves, that a duty of 24 per cent. was charged upon them by the collector of the said port, and that he, the said Bend, gave bonds to the said collector, to pay the said duties. That on an examination of the goods contained in one of the aforesaid cases, marked B 45, he found them to be spun silk hoisery, and not cotton gloves, as entered by him at the custom-house; and furthermore, that the goods are called upon the original invoice, passed at the custom-house, "spun knots," a term which is well known in the trade to be applied to hoisery of silk only, and that he verily believes the error of entering the said case, as paying duty, arose from the ignorance of his clerk who made the entry; that he, the said Bend, did not upon this, nor does he upon any occasion, examine whether the custom-house entries, made by the said clerk, are correct. And the said Wm. B. Bend, further maketh oath, that he has never sold any part of said case, B 45, and that to the best of his knowledge and belief, nothing has been ever taken from or added to it, but that it is in every respect, in the same condition as it was when he received it. Sworn to, before me, the day before written.

In testimony whereof, I have hereunto set my hand and affixed my seal notarial, this twenty-fifth day of April, one thousand eight hundred and thirty-eight.

W. B. BEND. [L. S.]

Sworn to, this 25th day of April, 1828, before me,
JOS. LEONARD, *Not. Pub.*

It was also proved that the package No. 45, was never in the custody of the collector, nor subjected to the examination of the public appraisers, and that the first intimation the collector had that it contained silk, was in March or April 1838.

It was also proved that the merchandize contained in the package No. 45, was silk hose, made of the tow of silk, a coarse quality of silk, but still silk, sometimes called sponged silk, and that the said merchandize, was well known, in commerce, under the denomination of hoisery.

Upon the foregoing evidence, given during the progress of the trial, the following points were presented on the part of the defendant, for the opinion of the judges, on each of which the judges were divided in opinion.

1. Whether assuming that an excess of duties was paid by mistake, under the facts above stated to the collector, on the before mentioned package, No 45, the plaintiff, under the said facts, is entitled to recover back such excess, in a personal action against the collector?

2. Whether the said silk hose was subject to the payment of the duty imposed on "hosiery" by the 2nd clause of the 2nd section of the act of July 14th, 1832, entitled, "An act to alter and amend the several acts imposing duties on imports; or whether, as manufacturers of silk, not being sewing silk, the goods, wares, and merchandize, contained in said package No. 45, were exempted from the payment of duty by the 4th section of the act of March 2nd, 1833, entitled, "An act to modify the act of the fourteenth of July, one thousand eight hundred and thirty-two, and all other acts imposing duties on imports," which declares that all manufacturers of silk, of which silk is the component material of chief value, coming from this side of the Cape of Good Hope, except sewing silk, shall be free?

Which said points, upon which the disagreement has happened, are stated above, under the direction of the judges of the said court, at the request of the counsel for the parties in the cause, and ordered to be certified into the Supreme Court of the United States, at the next session, pursuant to the act in such case made and

Witness the honorable Smith Thompson, presiding judge of the circuit court of the United States, for the southern district of New York, in the second circuit, this seventeenth day of January, in the year of our Lord one thousand eight hundred and thirty-nine, and of our Independence the sixty-third.

[SEAL.]

FRED. J. BETTS, *Clerk.*